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November 4, 2002

**REDACTED – FOR PUBLIC INSPECTION**

**VIA HAND DELIVERY**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Room CY-R402  
Washington, D.C. 20554

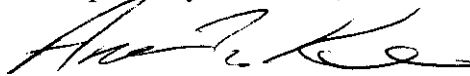
Re: Application by BellSouth Corporation for Provision of In-Region,  
InterLATA Services in Florida and Tennessee  
**Reply Comments; WC Docket 02-307**

Secretary Dortch:

Enclosed please find the Reply Comments of KMC Telecom III LLC. Since these comments contain confidential information, we are filing both redacted and confidential versions.

The undersigned electronically filed the redacted version of the Reply Comments, on November 1, 2002, and has served copies electronically on the parties noted in the Certificate of Service attached to the comments. Should you have any questions with regard to the foregoing, please do not hesitate to contact the undersigned at your convenience. Thank you for your assistance in this matter.

Respectfully submitted,



Andrew M. Klein  
Counsel to KMC Telecom III, LLC

Enclosure

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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of

Joint Application by BellSouth Corporation,  
BellSouth Telecommunications, Inc.,  
and BellSouth Long Distance, Inc. for  
Provision of In-Region, InterLATA Services  
in Florida and Tennessee

WC Docket No. 02-307

**REPLY COMMENTS OF KMC TELECOM III LLC**

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Dated: November 1, 2002

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of

Joint Application by BellSouth Corporation,  
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and BellSouth Long Distance, Inc. for  
Provision of In-Region, InterLATA Services  
in Florida and Tennessee

**REPLY COMMENTS OF KMC TELECOM III LLC**

KMC Telecom III LLC (“KMC”), by its attorneys, submits these reply comments in opposition to the Joint Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., (collectively “BellSouth”) for authority to provide in-region, interLATA services in the States of Florida and Tennessee, pursuant to section 271 of the Communications Act of **1934**, as amended (the “Act”).<sup>1</sup> KMC is a leading facilities-based competitor of BellSouth in both Florida and Tennessee: that has clearly demonstrated BellSouth’s shortcomings in meeting checklist items (i), (iv) and (xiii). None of the filings in this proceeding have rebutted that demonstration or altered the inescapable conclusion that BellSouth’s application must be denied.

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<sup>1</sup> 47 U.S.C. § 271; *see Comments Requested on the Joint Application by BellSouth Corporation for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Services in the States of Florida and Tennessee*, Public Notice, WC Docket No. 02-307, DA 02-2357 (Sept. 20, 2002).

<sup>2</sup> *See, e.g.,* Affidavit of BellSouth witness Elizabeth Stockdale, Exhibits ES-5 and **ES-6** (“*BellSouth Stockdale Affidavit*”).

**I. BELLSOUTH HAS SET FORTH NO JUSTIFICATION FOR ITS FAILURE TO COMPENSATE KMC FOR TRAFFIC TERMINATION**

BellSouth has failed to pay intercarrier compensation at levels well beyond any amounts corresponding to the issues BellSouth raises as possible reasons for its nonpayment. For over two years, BellSouth has consistently failed to pay the compensation owed to KMC without providing the factual and legal basis for its malfeasance. Now that BellSouth has – just this past week – finally identified two possible reasons why it has withheld payment, it is clear that there is no dispute over **96%** of the amounts billed by KMC.

Attached hereto as Exhibit A is the most recent correspondence between KMC Telecom and BellSouth that relates to BellSouth's failure to pay intercarrier compensation.<sup>3</sup> As the correspondence indicates, BellSouth has failed to remit over \* \$ \*<sup>4</sup> nationwide. While this amount represents approximately 38% percent of the amount billed by KMC nationwide, BellSouth's disputed amounts constitute only 4% of the total billed by KMC. Thus, there is no question that BellSouth's withholding of significant amounts that it concedes are not in dispute represents a violation of the Act.<sup>5</sup>

Two of BellSouth's most egregious violations of the Act have occurred in Florida and Tennessee, where BellSouth has failed to pay approximately \* \$ and \$ \*

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<sup>3</sup> Since the attachment to the letter contains BellSouth-originated information, it is not being tiled by KMC Telecom but may instead be obtained from BellSouth should the Commission desire this information.

<sup>4</sup> Confidential material is indicated by placement between the asterisks.

<sup>5</sup> 47 U.S.C. § 151, *et seq.* At a minimum, BellSouth's actions constitute violations of sections 251(c)(2), 252(d)(2)(A), 271(c)(2)(B)(i) and (xiii).

respectively. In Florida, this figure represents 36% of the amounts billed by KMC, while in Tennessee it is a remarkable 69% of the amounts billed by KMC.

As KMC noted in its initial comments, this is a clear-cut example of BellSouth's failure to comply with the Competitive Checklist that requires no interpretation of the parties' interconnection agreement. First, the Act itself requires BellSouth to show that it "is making all required payments in a timely fashion."<sup>6</sup> Second, the Act requires BellSouth to comply with the terms of the interconnection agreement, which clearly require BellSouth to pay KMC for the traffic BellSouth sent to KMC for termination. Finally, data provided by BellSouth to KMC shows that any dispute BellSouth has with KMC accounts for only a small fraction of the huge sum of money it has failed to remit to KMC.

In fact, BellSouth's failure to remit the remaining 4% of billed reciprocal compensation, which represents the amount BellSouth has defined as being in dispute, constitutes a separate violation of the Competitive Checklist. In correspondence from BellSouth to KMC this week, BellSouth finally asserts a basis for its failure to compensate KMC – *i.e.* that a portion of the traffic it was billed did not originate with BellSouth. The portion of the overall traffic for which KMC billed BellSouth that may fall into this category, however, is a miniscule 4% of the total, as noted above. Significantly, in making this assertion, BellSouth admits that it has been routing traffic which it understood to be transit over the trunk group specifically designated by the parties for BellSouth-originated local traffic.<sup>7</sup> This constitutes a separate

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<sup>6</sup> *BellSouth Joint Application* at 112 (citing *Texas 271 Order*, 15 FCC Rcd at 18538-39, ¶ 379)

<sup>7</sup> The KMC/BellSouth interconnection agreement requires the parties to "compensate each other on a mutual and reciprocal basis for the transport and termination of Local Traffic[.]" KMC/BellSouth Interconnection Agreement dated October 6, 2000, Attachment 3, Local Interconnection, section 6.1.2

...Continued

violation of the *KMC/BellSouth Agreement*,<sup>8</sup> and a separate violation of checklist item (i) that requires interconnection “in accordance with the terms of the agreement.”

The Commission has stated repeatedly that it has an “independent obligation” to ensure compliance with the checklist.” The FCC must meet its obligation in this instance by ensuring that BellSouth is paying to competitors the intercarrier compensation they are due.

BellSouth’s failure to meet the obligations imposed by the Act and the *KMC/BellSouth Agreement* is clearly distinguishable from those instances in prior section 271 proceedings where the Commission declined to consider certain issues in determining checklist compliance. As illustrated below, this is not an interpretive dispute, and is not the subject of an ongoing state commission proceeding to which deference could be given. Each and every scenario discussed below is distinct from the current KMC/BellSouth issue.

In the most recent BellSouth proceeding, AT&T asserted that BellSouth had unreasonably refused to accept AT&T’s revised PLF and had failed to establish a LATA-wide

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(*KMC/BellSouth Agreement*). Local Traffic is defined in section 6.1.1 as “any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area Service (“EAS”) exchange.” Wireless Type 1 and 2A traffic “shall not be treated as transit traffic from a routing or billing perspective” until, for type 2A traffic only, BellSouth and the wireless carrier can meet-point bill. *Id.* at § 6.9.

<sup>8</sup> The agreement requires that transit traffic be routed on a trunk group separate from the trunk group used for BellSouth-originated local traffic. *See, e.g., KMC/BellSouth Agreement*, Interconnection Attachment, at sections 2.3 and 2.5.2.1, and Exhibits B, C and D. KMC has billed BellSouth for traffic that BellSouth routed via the local trunk group designated for BellSouth-originated local traffic, which by definition is traffic subject to reciprocal compensation.

<sup>9</sup> 47 U.S.C. § 251(c)(2)(D); *New York 271 Order*, ¶ 63.

<sup>10</sup> *See, for example, Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant To Section 271 Of The Telecommunications Act Of 1996 To Provide In-Region, InterLATA Services In Texas*, Memorandum Opinion and Order, CC Docket No 00-65, FCC 00-238, ¶ 383 (rel. June 30, 2000) (“*Texas 271 Order*”).

calling area as the parties' interconnection agreement had apparently required." The Commission responded that it would not modify state-established guidelines for LATA boundaries and rejected AT&T's request that it modify the state commission's distinction between calls subject to reciprocal compensation versus those subject to access charges." The Commission determined that the AT&T/BellSouth issue was an "interpretive dispute" that was, in light of the involvement of the state commission on the issues presented, for the state to decide in the first instance. The Commission reiterated its position that it "will not normally preempt a state commission's decisionmaking process."<sup>13</sup>

As the correspondence between KMC and BellSouth demonstrates, BellSouth's failure to remit appropriate reciprocal compensation does not result from an interpretive dispute. BellSouth's own statements and data highlight its failure to pay what is due. In addition, there are no PLF or LATA-boundary issues present here that might involve state commission-set policy. Rather, the BellSouth obligation to pay the compensation due comes straight out of the Act itself – as BellSouth acknowledged in its application.<sup>14</sup>

In the Verizon-New Jersey proceeding, Cavalier alleged that Verizon refused to provide compensation for Verizon-originated traffic that Cavalier carried from the physical

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<sup>11</sup> *Joint Application by BellSouth Corporation for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Services in the States of Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, Memorandum Opinion and Order, WC Docket No. 02-150, ¶ 228 (rel. Sept. 18, 2002) ("*BellSouth Multi-State Order*").

<sup>12</sup> *Id.*, ¶ 229.

<sup>13</sup> *Id.*, ¶ 230.

<sup>14</sup> *BellSouth Joint Application* at 112 (citing *Texas 271 Order*, 15 FCC Rcd at 18538-39, ¶ 379).



interconnection point to Cavalier's switch.<sup>15</sup> The Commission determined that this was a billing dispute based on conflicting interpretations of an interconnection agreement that should be resolved by the New Jersey Board. It noted further that the dispute was, in fact, already the subject of an ongoing proceeding in Delaware.<sup>16</sup> The Commission reiterated its position that section 271 does not compel it to "preempt the orderly disposition of intercarrier disputes by the state commissions."<sup>17</sup>

While facially similar, the Cavalier/Verizon dispute actually has little in common with the instant matter. There is no issue here that requires the interpretation of an interconnection agreement, and KMC is not billing BellSouth for both compensation and use of the underlying transmission facility as Cavalier was asserting it had the right to do pursuant to its agreement. As with the AT&T/BellSouth dispute noted above, the Cavalier/Verizon dispute was also in the process of being resolved by a state commission and was already assigned to a hearing examiner. The Commission again concluded that it was logical to defer to the state commission in that instance. These important facts differentiate the instant matter.

Sprint had asserted, in the Verizon Pennsylvania proceeding, that Verizon had failed to properly characterize "00 minus calls" as access or local, and compensate Sprint accordingly.<sup>18</sup> Since this Sprint/Verizon dispute was actually part of an ongoing arbitration before the Pennsylvania PUC, the Commission again determined that section 271 should not

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<sup>15</sup> **New Jersey 271 Order**, WC Docket No. 02-67, ¶ 159 (*citing* Cavalier NJ II Comments at 3-4).

<sup>16</sup> *Id.*, ¶ 159.

<sup>17</sup> *Id.*, *citing Verizon Pennsylvania 271 Order*, 16 FCC Rcd at 17484, ¶ 118.

<sup>18</sup> *Verizon Pennsylvania 271 Order*, 16 FCC Rcd 17484, ¶ 118.

compel it to “preempt the orderly disposition” of such disputes by the state commissions.<sup>19</sup>

Since the Sprint/Verizon dispute involved the appropriate characterization of certain traffic, which was being litigated concurrently with the FCC proceeding, it is clearly distinguishable from the current situation in which BellSouth is simply failing to pay. The factors present in the Verizon Pennsylvania proceeding are simply not present here.

Thus, while BellSouth is likely to claim that its failure to pay compensation in accordance with the Act is somehow an interpretive dispute that should be disregarded by the Commission, the facts do not support such an assertion. To the contrary, BellSouth’s continued failure to provide intercarrier compensation and to engage in the appropriate routing of traffic mandates a finding that BellSouth has not satisfied checklist items one and thirteen. Since BellSouth cannot demonstrate that it has actually carried out the obligations set forth in the Act and its interconnection agreements, BellSouth cannot be found to have met the Checklist’s requirements. The Commission must, consistent with its precedent, require that BellSouth cure such failures before being granted interLATA operating authority.

## **II. BELLSOUTH’S FAILURE TO PROVIDE ACCESS TO LOOPS IN ACCORDANCE WITH THE CHECKLIST CONTINUES UNABATED**

BellSouth’s remarkably poor performance in providing access to loops continues unabated. The impact of BellSouth’s horrendous facility availability performance, as captured by the “Percent Jeopardy” metric, cannot be overstated. In August, two out of every three competitor DS-1 and higher loop orders were placed in jeopardy status in Florida, while nearly

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<sup>19</sup> *Id.*

three out of four were in Tennessee.” This discriminatory performance manifests itself in other measurement categories as well

BellSouth’s biased facility-assignment practices cause it to miss many more installation appointments for competitors. In fact, in both Florida and Tennessee, BellSouth has missed more DS-1 and higher installs for competitors than it has for its retail customers in each of the past four months.<sup>21</sup> In August, 2002, BellSouth missed nearly six times as many DS-1 and higher installations for competitors in Florida, and over twice as many in Tennessee. BellSouth admits that most of these missed appointments are attributable to facility issues.<sup>22</sup>

In those instances where BellSouth actually installs the competitor’s loop, the circuits fail with much greater frequency. As noted in KMC’s opposition, BellSouth has itself admitted that “[w]hen a jeopardy is issued, some of the time that would otherwise be allocated for testing and turn up of the circuit may be lost in trying to resolve the jeopardy.”<sup>23</sup> “The tradeoff to meet the customer due date may increase the potential for error.”<sup>24</sup> Thus, both the performance data and BellSouth’s own testimony reveal a direct correlation between the incidence of jeopardies and subsequent circuit failure rates – which remain way out of parity.

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<sup>20</sup> BellSouth Monthly State Summary, Metric B.2.5.19, Percent Jeopardies – Mechanized (August, 2002).

<sup>21</sup> May-August, 2002. BellSouth Varner Affidavit, Exhibits PM-30 and **PM-31** (entitled Florida/Tennessee Performance Summary Key Metrics Submetrics) and BellSouth *expurte* #1, filed October 1, 2002, metric B.2.18.19.1.1. Remarkably, BellSouth listed the result for Tennessee in PM-31 in July as “in parity” despite the fact that its performance to CLECs was 47% worse than retail, on a comparable base of orders.

<sup>22</sup> *BellSouth Joint Application* at 92.

<sup>23</sup> *Georgia/Louisiana II* proceeding, CC Docket 02-35, BellSouth *expurte* filing at 3 (Apr. 17, 2002).

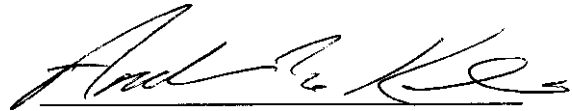
<sup>24</sup> *Id.*

In sum, BellSouth's failure to provide access to loops on a nondiscriminatory basis is clearly demonstrated by several key metrics: Percent Jeopardies, Percent Missed Appointments, Number of Installation Troubles, and the overall Customer Trouble Report Rate. The Commission must require better performance before considering a finding of Checklist compliance.

### III. CONCLUSION

For the foregoing reasons, KMC respectfully requests that the Commission find that BellSouth has not complied with section 271 and deny the instant application accordingly.

Respectfully submitted,



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Dated: November 1, 2002

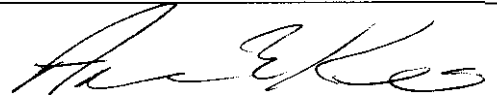
# EXHIBIT A

(Redacted from Public Version)

**CERTIFICATE OF SERVICE**

I, Andrew Klein, hereby certify that on this 1<sup>st</sup> day of November, 2002, copies of the foregoing were served electronically on the following:

Marlene Dortch, Secretary Federal Communications Commission 445 12 <sup>th</sup> Street, SW Room CY-B402 Washington, D.C. 20554	Janice Myles Wireline Competition Bureau Federal Communications Commission 445 12 <sup>th</sup> Street, SW Room 5-B145 Washington, D.C. 20554
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